Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

COMMENTS OF THE PACE COALITION, BROADVIEW NETWORKS, GRANDE COMMUNICATIONS, AND TALK AMERICA INC.

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EXECUTIVE SUMMARY

In the 1996 Act, Congress mandated dual goals: to bring competition to the traditional local telecommunications services market and to promote the deployment of advanced services. To accomplish these objectives, Congress required the Commission to open the incumbent local exchange carriers' ("ILEC") monopoly local networks to competition, obligating the ILECs to unbundle certain network elements, including local switching, and make them available to competitive local exchange carriers ("CLECs"). If the Commission were to relax those unbundling requirements now, it essentially would restore the ILEC monopoly in the plain old telephone services ("POTS") market, undermining the goals and the explicit language of the Act and leading to less competition in the advanced services market, to the detriment of consumers.

The court's decision in *USTA II* does not preclude the Commission from requiring ILECs to provide unbundled local switching to CLECs seeking to provide POTS services to residential and small business customers. In *USTA II*, the court faulted the Commission for delegating authority to the states to determine whether carriers were impaired without access to ILEC switches, and for not evaluating the propriety of certain alternatives to a broad national finding of impairment. The court, however, did not prohibit the Commission from concluding that CLECs providing POTS services are impaired without unbundled local switching.

The Commission's national impairment finding in the *Triennial Review Order* was correct. Evidence gained since the *Triennial Review Order* validates the Commission's conclusion that CLECs are impaired without unbundled local switching. Consistent with the Commission's conclusion in the *Triennial Review Order*, record evidence developed in state impairment dockets demonstrates that there are no wholesale markets for mass market local

switching, and that CLECs continue to encounter substantial economic and operational barriers in deploying their own switches to serve mass market customers. Further, no matter how the Commission defines the market, the data collected in the state proceedings demonstrate that there is no significant mass market competition today occurring from CLECs using the ILECs' analog unbundled loops in conjunction with competitively provided switching.

Requiring ILECs to unbundle their monopoly local networks is necessary so that all consumers who desire basic voice services have competitive alternatives. The Commission should not artificially truncate the POTS market by adopting an arbitrary line count to define the upper boundary of the mass market. Instead, the Commission should allow consumers to self-define whether they are mass market customers by holding—as Verizon advocated in state impairment dockets—that any customer who purchases one or more analog lines at a single location is a mass market customer.

CLECs continue to face substantial economic and operational barriers when attempting to enter the POTS market. The deployment of competitive switches to serve the POTS market requires, at a minimum, line concentration to overcome the ILEC's legacy network design. The architecture of the ILEC's legacy network, which was designed to support one monopoly service provider, forces CLECs who wish to compete using a non-ILEC switch to incur the costs associated with transporting traffic from each of the ILECs' central offices in which the CLEC has customers to its switch. CLECs also must incur both costs associated with collocation, including the cost of the equipment and the physical space, as well as hot cut costs for each central office associated with its customers. Current ILEC hot cut procedures, which vary by ILEC and by state, pose an additional substantial barrier to entry for CLECs serving the mass (POTS) market. CLECs must use hot cuts for every single conversion to their switch. Yet,

there are not sufficient and workable procedures in place to transition customers in a timely manner without potential service disruption. These barriers to entry in the POTS market are virtually insurmountable without unbundled access to the ILEC's switch.

Despite the substantial impairments that CLECs serving the POTS market encounter, even if the Commission were to find that CLECs are not impaired nationwide, the answer is not to permit ILECs to cease providing unbundled local switching as a section 251(c)(3) network element. Indeed, the Commission should require limited unbundling, rationally related to the goals of the Act, as follows:

- Require ILECs to provide unbundled local switching until each CLEC has achieved sufficient density in a wire center to deploy its own facilities;
- Require ILECs to provide unbundled local switching to Eligible Telecommunications Carriers ("ETCs") so that they can pursue strategies of universal competition; and
- Tie the ultimate elimination of unbundling under section 251(c)(3) to systems and policies that enable next-generation competition.

Line Concentration Proposal: At a minimum, the Commission should require ILECs to continue to provide unbundled local switching until a CLEC has acquired 1,500 lines in a particular wire center. Once a carrier has achieved this density, the carrier would be subject to the transition plan – with slight modifications – that the Commission adopted (and that the ILECs did not challenge) in the *Triennial Review Order*. As stated above, although collocation and transport costs create a substantial barrier to entry, these impairments may be overcome where a CLEC is able to achieve sufficient line concentration to justify these costs. Specifically, use of competitively-provided switching may be justified in those central offices where an entrant can expect to terminate the lowest-level of optical capacity, an OC-3. Assuming a 70% fill rate, an OC-3 facility is not cost-justified until a carrier has a base of approximately1,500

lines in a wire center. By permitting carriers to lease unbundled local switching to serve customers in wire centers where the threshold density has not been achieved, carriers will be able to cost effectively meet customer demand and operate their businesses in an efficient manner.

Universal Competitor Strategy: In addition to the line density proposal, the Commission should adopt a proposal that reflects the impairment that the universal competitor experiences, that is, the competitor whose business strategy is to compete against the ILEC by offering service across the same broad geographic footprint as the ILEC. To address the unique impairment of this class of carrier, the Commission should continue to require unbundling (subject to review in three years) for any carrier meeting the line density threshold above if the carrier is designated as—or is willing to be designated as—an ETC. In other words, even if the carrier meets the line density threshold in a particular wire center, if the carrier is designated as an ETC, then the carrier will continue to receive local switching as a section 251(c)(3) UNE.

Transition Plan: If the Commission adopts a finding of non-impairment in any particular market, then it is critical that it adopt a transition plan to avoid disruption to mass market customers served by CLECs. The Commission's transition plan should be based on the transition plan that it adopted in the *Triennial Review Order* with three limited modifications:

- First, the Commission should adjust its plan to recognize that there are exceptions to any general finding of non-impairment, such as instances of no facilities that preclude the commercial use of alternative local switching and that require continued unbundling.
- Second, the Commission must identify the preconditions that must be in place for line migrations to commence, including a review of the section 271 just and reasonable rate for local switching when it is no longer available as a network element under section 251.
- Third, the Commission must adopt a plan that recognizes the additional processes necessary to facilitate the transition of customers and carriers to next-generation business plans and services.

In particular, the Commission must require BOCs to have *bona fide* section 271 offerings in place prior to permitting them to cease providing local switching under section 251(c)(3). In addition, the Commission must adopt a transition plan that takes into account the substantial impairment CLECs encounter through hot cuts, by requiring that ILECs adopt certain processes and procedures to facilitate hot cuts and to mitigate customer disruption.

Currently, at least 17 million residential and small business POTS customers are benefiting from local competition, and the Commission should not take any action that would prevent those customers – and future customers – from being served by CLECs. This competition has been able to develop because of the availability of unbundled local switching and UNE-P. The substantial operational and economic barriers to serving this market in the absence of unbundled local switching that the Commission found in the *Triennial Review Order* remain in place today, and any reduction in the availability of unbundled local switching for CLECs to use to serve mass (POTS) market customers would serve to re-monopolize the POTS market.

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The Promoting Active Competition Everywhere ("PACE") Coalition, Broadview Networks, Grande Communications, and Talk America Inc. (collectively, the "Joint Commenters"), through their undersigned counsel, respectfully submit their comments in response to the Notice of Proposed Rulemaking issued in the above-captioned proceeding.[1]

The PACE Coalition is composed of competitive local exchange carriers that provide a variety of telecommunications services to businesses and residential consumers throughout the country. Each PACE Coalition member company offers a form of bundled local exchange and local distance services, among other services, to residential and small business customers using the combination of unbundled network elements commonly referred to as the Unbundled Network Element Platform ("UNE-P").

Founded in 1996, *Broadview Networks* ("Broadview") is a network-based electronically integrated communications provider ("e-ICP") serving small and medium-sized

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1 *Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking*, FCC 04-179 (rel. Aug. 20, 2004) ("*Permanent Rules NPRM*").

business and communications-intensive residential customers in the northeastern and Mid-Atlantic United States. Primarily, Broadview relies on its own switches, collocated facilities, and UNE-P to offer bundled packages of local, long-distance, data, dial-up Internet access, and high-speed Internet services to its customers, which include small and medium-sized businesses and residential consumers.

Grande Communications ("Grande") provides both residential and commercial customers in communities in Texas with a bundled package of telephone, Broadband Internet and cable television service. Grande delivers service over the fiber optic, SONET network that it is building in the streets and alleyways of the cities it serves. Grande's network includes its own switching capacity and its own long haul fiber network in Texas, Oklahoma, Arkansas, and Louisiana. Grande Communications also provides network services that include services to other carriers.

Talk America Inc. ("Talk America") is a facilities-based CLEC based in Reston, Virginia. The company offers a complete set of telecommunications services, including local and long distance voice, Internet access, and DSL. Services are provided to more than 600,000 residential and small business customers by means of a combination of the company's own facilities, UNEs, as well as services purchased from ILECs and facilities and services purchased from other competitive telecommunications carriers. Talk America has over 300,000 customers in Michigan and is in the process of building out a facilities-based network, including a Lucent 5e switch and nine (9) collocations in Detroit to serve those customers.

I. INTRODUCTION.

It has taken years of struggle for competition in the wireline plain old telephone service ("POTS") market to gain a significant toehold.[2] Indeed, only recently has competition become a reality for many mass market (*i.e.*, POTS) consumers in the United States. Competitive local exchange carriers ("CLECs") have had to fight to gain and to retain access to the unbundled network elements ("UNEs") that they need to provide POTS service. Due to significant impediments in the marketplace for carriers to deploy and use their own switches to serve the traditional phone subscriber, Unbundled Network Element Loop ("UNE-L") competition in the POTS market has been slow to develop, and the POTS competition that exists today is largely – if not exclusively – attributable to the availability of the UNE-P. CLECs must have continued access to UNE-P to be able to serve this market, and for POTS customers to continue to have choices in their providers of telephone service.[3]

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2 "POTS" is the acronym for "Plain Old Telephone Service," the general industry term applied to conventional analog phone service that provides customers dial tone, the ability to select from an array of common vertical features, and to make or receive local and long distance calls from other subscribers. In these comments, the term "POTS" is used synonymously with the "mass market" and these terms will be used interchangeably throughout the comments.

3 The Joint Commenters focus their comments on unbundled local circuit switching, and are not addressing issues pertaining to the availability of high-capacity loops or dedicated transport, although the availability of these network elements also is critical to these companies.

II. THE 1996 ACT MANDATES THE PROMOTION OF COMPETITION FOR MASS MARKET (POTS) SERVICES.

When Congress enacted the Telecommunications Act of 1996,[4] its goals could not have been more clear: to encourage the deployment of advanced facilities *and* to bring competition to consumers of traditional phone services – commonly referred to as the "POTS market." In the years since the 1996 Act passed, these goals have not changed, nor have their importance. The Commission's unbundling policies must be designed to promote both; it is not free to merely encourage one, while ignoring the other.

As explained below, the twin goals of competition in the advanced services market[5] and the traditional POTS market in no way conflict with one another – to the contrary, their fates are interlinked. Strong POTS competition will lead to more competition for advanced services; on the other hand, if POTS competition fails, advanced services competition will be seriously harmed as well.

There is nothing in *USTA II's* admonition that the Commission must conduct a "more nuanced" analysis of impairment that is "aimed at tracking relevant market characteristics and capturing significant variation"[6] that justifies the Commission ignoring the POTS market. The POTS market is a distinct and separate market that must be analyzed on its own, according to its own distinguishing features and characteristics. Importantly, the traditional POTS market

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4 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.* ("1996 Act").

5 The Joint Commenters use the term "advanced services" to describe services that use, in whole or in part, higher-speed digital facilities to meet the customer's needs. This would include, by definition, the integrated suites of voice and data used by enterprise customers, whether provided in TDM or packet format.

6 *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 563 (D.C. Cir. 2004) ("*USTA II*").

is virtually the *same size* today as it was when Congress passed the 1996 Act – and just as much in need of competitive reform now as then. The new services and additional competition that has grown up *around* the POTS market – including wireless, VoIP and high-speed data services – in no way have diminished the Act's core mission of bringing competition to the typical residential customers and analog small businesses that remain a backbone of the ILEC monopoly.

The Joint Commenters remind the Commission that the unbundling policies of the 1996 Act were written "... not just to balance interests between sellers and buyers, but to reorganize markets."[7] It is that task – to reorganize the POTS market from one of monopoly control to competition – that forms the central focus of these comments. It is access to unbundled local switching that brings competition to the POTS market, just as Congress intended.

A. The Purpose Of The 1996 Act Is To Promote Competition In Both The POTS And Advanced Services Markets.

The 1996 Act set out to radically change telecommunications markets, eliminating the ILECs' local exchange monopoly, and, in return, permitting entry by the Bell Operating Companies ("BOCs") into the long distance services arena. In the *Local Competition Order,* the Commission recognized that opening the ILECs' networks and promoting competition in the POTS market by all providers of telecommunications services would "blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers."[8] Without access to the ILEC's network, the Commission

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7 *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489 (2002).

8 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 4 (1999) ("*UNE Remand Order*").

acknowledged, the economic and operational barriers inherent in the ILECs' monopoly structure would be insurmountable and thus prohibitive to competition.[9]

The core telecommunications market that existed when Congress passed the 1996 Act was the POTS – or, as the Commission labeled it in the *Triennial Review Order,* the mass – market.[10] After decades of government protection, Congress established an entirely new policy that the public switched network should be available to competitors, both so that entrants could establish the necessary foothold to introduce new technologies, and so that they could bring competitive choice to the service offering that dominated at the time, the analog-based POTS market.

Although much has been made concerning how telecommunications markets have changed in the time since Congress passed the 1996 Act, there are some things that have remained remarkably stable. The most significant change in the industry has been the rapid expansion of high-speed digital (DS1 and above) services. Yet, while digital services have grown dramatically, the POTS market is largely the same today as it was in 1996.

Table A shows the relative size of the traditional POTS[11] and high-speed digital markets at the time the 1996 Act was passed and now.

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9 *Implementation of the Local Competition Provisions of the Telecommunications At of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

10 Indeed, the central theme of the United States Telecom Association's ("USTA") public policy advocacy – that the 1996 Act did *not* consider a range of new services available today – is an admission that the Act was principally concerned with encouraging competition for traditional POTS service. *See, e.g.,* www.usta.org/index.php?urh=home.advocacy.industry-issues.ii_mbc.

11 The Commission's ARMIS data does not include any loop categories that directly measure the "POTS" market. In Table A, Total Working Channels is used to

. . . *Continued*

Table A: Relative Scale of Analog/Digital Markets In 1996 and Today

Working POTS Loops[12]	**Jan. 1, 1996**	**Dec. 31, 2003**
BellSouth	24,682,894	24,334,185
Qwest	15,347,150	15,607,156
SBC	52,509,805	53,345,041
Verizon	62,609,544	63,307,637
Digital Channels (VGE)[13]		
BellSouth	3,522,816	116,860,737
Qwest	1,559,208	67,288,756
SBC	8,648,736	120,757,393
Verizon	Not Available[14]	
Percent Digital		
BellSouth	12%	83%
Qwest	9%	81%
SBC	14%	69%
Verizon	Not Available	

Table A illustrates several critical points. First, the data in the table makes clear that the primary market Congress would have been focused on in 1996 must have been the traditional POTS market, which then represented nearly 90% of the ILEC's working loops. Second, the data in the table demonstrates that advanced digital-based services grew rapidly, even though such facilities were fully subject to the unbundling provisions of the Act, thoroughly

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approximate the relative size of the market (in terms of loop capacity). Other measures, such as Main Access Lines or Switched Access Lines (ARMIS 43-08) could also be used to approximate the "POTS Market" without materially changing the fundamental conclusions of this section.

12 ARMIS 43-07, Total Working Channels. Working channels are measured on a 4 kHz (single voice channel) basis and include loops on copper facilities, as well as fiber-fed digital loop carrier systems.

13 ARMIS 43-07, DS1s and DS3s Terminated at Customer Premise.

14 Verizon's ARMIS data exhibits a pattern (dramatic reductions in DS1 activity since 1996) that only can be explained by an error in the data. As such, it has been excluded from the table.

disproving the claim that cost-based unbundling discourages the ILEC from deploying new services.

The points immediately relevant to the issues here, however, are twofold. First, even though the *relative* size of the traditional phone market has declined (such that POTS channels now represent approximately one-quarter of the loop capacity on a voice grade equivalent ("VGE") basis),[15] the *absolute* size of the POTS market generally has remained stable and is essentially the same today as it was when the Act was passed.[16] In other words, the *market* that Congress set out to reorganize in 1996 – consisting of those phone subscribers, both residential and small business, interested in traditional phone service – has not diminished, even though a *separate* market of higher-speed digital services has emerged and is now the larger of the two. The principal problem that Congress wanted the Commission to correct in 1996[17] – the ILEC POTS monopoly – is as large today as it was in 1996.

Second, by limiting unbundled local switching to the analog POTS market, the Commission has responded *fully* to the court's directive in *USTA I*[18] that it conduct a "nuanced" impairment analysis that considers "relevant market characteristics and captur[es] significant

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15 As noted, because of a reliability problem with the Verizon data, this calculation considers only Qwest, BellSouth, and SBC.

16 Specifically, the number of working channels (not including DS1 or DS3 capacity terminated at the customer premise) for the RBOCs is 1% more today than it was in 1996.

17 The fact that Congress intended for the traditional phone market to become competitive, however, does not suggest that it was uninterested in seeing competition develop for digital services or other advanced services. To the contrary, Congress intended for competition to develop in *all* markets, including the market for traditional services.

18 *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) ("*USTA I*").

variation."[19] By limiting the unbundling requirement for local switching to the analog POTS market, the Commission has excluded nearly 70% of the line capacity (served at DS1 and above) from local switching unbundling.[20] Furthermore, the Joint Commenters estimate that if the Commission further collapses the mass market to exclude lines at customer locations with more than two lines, approximately half of the business lines will not be able to be served by unbundling local switching.[21]

Not only did Congress specifically envision that competition for the POTS market would result from the Act, but also it fully expected that unbundled local switching would play an important role in bringing about competition. Congress specifically listed local switching in section 271's competitive checklist and *twice* referenced it in the Joint Explanatory Statement that accompanied the 1996 Act:

> The term "network element" was included to describe the facilities, such as local loops, equipment, *such as switching*, and the features, functions, and capabilities that a local exchange carrier must provide for certain purposes under other sections of the conference agreement.
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19 *USTA II*, 359 F.3d at 563.

20 The Joint Commenters recognize that some portion of the existing digital capacity is today used exclusively for data services. As the Commission is aware, however, customers served by high-speed data connections are able to use such connections for voice services. As explained below in more detail, this expansion of options for customers that have migrated out of the POTS market does not fundamentally change the nature of the POTS market itself – customers that are not part of the advanced services market (*i.e.*, customers that are not served by high-speed data connections) form a separate and distinct market for whom the existence of competition in the high-speed marketplace is immaterial.

21 *See infra* Section III.E.

> Some facilities and capabilities *(e.g., central office switching)* will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251.[22]

Although the court in *USTA II* requires the Commission to "balance" the advantages of unbundling with its costs,[23] it is important to appreciate that Congress already weighed that balance with respect to the use of unbundled local switching. Each BOC has spent millions to operationalize UNE-P so that it could offer in-region long distance service, and there are no additional costs associated with the "complex issues of managing shared facilities"[24] to balance against the benefits of the only known strategy that brings competitive choice to the mass market.

Even with the unbundling regime as defined by the *Triennial Review Order* in place, competitive carriers are only slowly establishing a competitive POTS market, with UNE-P today serving only 17 million American residences and small businesses, a small fraction of what the ILECs serve.[25] Even so, for each line used for UNE-P by a CLEC, the BOCs add four long distance lines,[26] and are rapidly extending their local POTS monopoly into long distance.[27]

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22 Joint Explanatory Statement of the Committee of Conference, Report No. 104-458, 104th Congress, 2nd Sess. (*emphasis added*).

23 *USTA II,* 359 F.3d at 570 (*citing USTA I,* 290 F.3d at 429).

24 *Id.*

25 *Local Telephone Competition: Status as of December 31, 2003*, Federal Communications Commission, Industry Analysis and Technology Division, Wireline Competition Bureau, Table 2 (rel. June 18, 2004) ("*2003 Local Telephone Competition Report*").

26 *See* RBOC 2nd Quarter 2004 Earnings Releases.

27 For instance, BellSouth already has captured 39% of the residential market and 48% of the small business market. *See* BellSouth Form 10-Q Filing, Securities and Exchange Commission, for the quarter ending June 30, 2004. The BOCs that now are trying to

. . . *Continued*

AT&T's announced plans to abandon the POTS market demonstrates conclusively that eliminating unbundled local switching will lead to a re-monopolization of this market, in direct contravention of Congress's intent.[28]

B. Intermodal Alternatives Are Not POTS Substitutes.

The existence of so-called intermodal alternatives – specifically, wireless and VoIP services – has not changed the fundamental nature of the POTS market. In the *Triennial Review Order*, the Commission acknowledged the need to consider the nature and extent of competition brought about by intermodal providers in order to comply with the court in *USTA II*.[29] As explained below, wireless and VoIP services comprise separate markets, meeting different customer needs and are suitable to different customer segments. The mere existence of such services in no way lessens the need for competition in the wireline POTS market.

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eliminate UNE-P obtained authority under section 271 of the Act to provide in-region interLATA service on the basis that competition existed in their markets. If the Commission eliminates unbundled local switching and UNE-P based competition, then it merits reassessment of whether BOCs should be in the long distance market.

28 *See AT&T To Stop Competing in the Residential Local and Long-Distance Market in Seven States.* (June 23, 2004), available online at http://www.att.com/news/item/0,1847,13121,00.html. Attached hereto at Exhibit 1.

29 *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶¶ 97-98, 443 & n. 1549 (2003), *corrected by Errata*, 18 FCC Rcd 19020 (2003), *reversed and remanded, United States Telecom Assoc. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*Triennial Review Order*") (requiring state commissions to consider whether intermodal alternatives are comparable in "cost, quality and maturity" to the ILEC's switches).

1. *Wireless service is not POTS.*

First, no one disputes that wireless service is popular. The issue, however, is not whether consumers and small businesses *also* have wireless phones, but whether such phones are substitutes for traditional POTS services. The evidence at this point is clear that, for the vast majority of customers, wireless service is complementary to their POTS service, not a substitute.

To begin, the Joint Commenters note that at least two BOCs – SBC and BellSouth – agree with this assessment. As their economist explained in the context of the Cingular/AT&T Wireless merger, wireless and wireline service are in separate product markets:

> The relevant product market for the analysis of this transaction excludes wireline services. Although there is some competition between wireless and wireline services, it is not currently sufficient to conclude that a wireless-only product market is too small for antitrust analysis of this transaction. Specifically, consumer substitution from wireless to wireline would not be sufficient to make unprofitable a small but significant and non-transitory price increase by a hypothetical monopoly supplier of mobile wireless service. At the present time, wireline service is sufficiently differentiated from wireless service to exclude wireline from the relevant product market.[30]

The Commission has reached a similar conclusion, stating:

> While specific data is largely unavailable, it appears that only a small percent of wireless customers use their wireless phones as their only phone, and that relatively few wireless customers have "cut the cord" in the sense of canceling their subscription to wireline telephone service.[31]

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30 Affidavit of Richard J. Gilbert, WT Docket No. 04-70 (filed Mar. 18, 2004).

31 *Implementation of Section 602(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services,* WT Docket 04-111, Ninth Report, FCC 04-216, ¶ 212 (rel. Sept. 28, 2004).

In fact, wireline-to-wireless porting of telephone numbers averaged only 54,000 numbers per month during the first four months of 2004, representing less than 8% of the numbers ported.[32] Moreover, the BOCs generally approach wireless service as a *complement* to their wireline services, frequently offering packages that include both wireline and wireless service. If customers perceived these products as substitutes, it would make little sense to market them jointly. Bundled local/wireless offerings are clearly successful – 80% of Cingular's wireless subscribers are located in the territory of its wireline parents,[33] suggesting a success rate in the BellSouth/SBC territory roughly four times greater than elsewhere.

The fact that many customers *also* have a wireless phone simply means the service is popular; it does not mean that it is a substitute for wireline service. As SBC's Chairman observed about wireless:

> It's not going to displace the wire-line network. It's certainly going to be a big product, but it's never going to be the substitute. Reliability is one reason.[34]

One objective statistic on wireless-wireline substitution comes from the Census Bureau's Current Population Survey. This survey asked both the "main reason home telephone service was stopped," and the "main reason no home service (ever)."[35] Of the 141,034 valid responses, only 155 (0.11%) responded that they stopped home phone service because they use a

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32 *Id.* ¶ 164.

33 Presentation of Randall Stephenson, SBC Senior Executive Vice President, to Lehman Brothers Telecom Trends and Technology Conference (Dec. 9, 2003).

34 *A Wireless World*, BUSINESS WEEK, at 111 (Oct. 27, 2003). Attached hereto as Exhibit 2.

35 *Computer and Internet Use* (Sept. 2001), Table 1, Questions HRTELR11 and HRTELR21, respectively. Available online at http://www.census.gov/hhes/income/income03/statemhi.html. Attached hereto as Exhibit 3.

wireless phone, and only 165 (0.12%) responded they never had home phone service because they used wireless service.[36] These statistics challenge any claim that wireless should be considered a substitute for POTS today. The Joint Commenters note that *USTA II* requires the Commission to conduct a separate impairment analysis with respect to "wireless providers" access to dedicated transport, which fundamentally presupposes that wireless providers are in a separate product market than wireline competitors.[37]

Finally, there is no evidence to suggest that wireless service is a substitute for a small business customer. It is difficult to imagine the prototypical small business eliminating its wireline phone service (which comes with the important yellow pages listing) and relying exclusively on wireless service, particularly with its reputation for reliability and quality.[38] The POTS market remains a distinct market for the analog small business customer, and one where competition remains dependent upon access to unbundled local switching.

2. *VoIP service is not POTS.*

As a threshold matter, it is premature to even *claim* that VoIP-based telephony is a viable competitive alternative to POTS. VoIP-based services are just now being introduced

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36 In fact, more people stopped their home phone service simply because they did not want it (187, 1.3%) than because they have substituted wireless service for wireline service (155, 0.11%). *See also Phoenix Center Policy Bulletin No. 10, Fixed-Mobile "Intermodal"* Competition in telecommunications: Fact or Fiction? (Mar. 31, 2004), available online at http://www.phoenix-center.org. Attached hereto as Exhibit 4.

37 *See id.; see also USTA II*, 359 F.3d at 575-77.

38 One of the highest-profile advertising campaigns for wireless service – the "can you hear me now?" campaign – is based on wireless service's reputation for uneven service. This advertising campaign is well known precisely because most consumers can relate to the experience of having to test signal quality before continuing with a conversation. That type of reliability, which consumers are clearly willing to trade-off for mobility, does not mean that wireless service is an acceptable substitute for wireline POTS services.